Date: 20060425

Docket: T-3-06

Citation: 2006 FC 509

OTTAWA, ONTARIO, April 25, 2006

PRESENT: The Honourable Mr. Justice von Finckenstein

BETWEEN:

OMAR AHMED KHADR

Applicant

and

THE MINISTER OF JUSTICE AND ATTORNEY GENERAL OF CANADA, THE MINISTER OF FOREIGN AFFAIRS, THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE SERVICE and THE COMMISSIONER OF THE ROYAL CANADIAN MOUNTED POLICE

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicant, Omar Khadr, is a Canadian citizen who is currently a prisoner in a US military detention camp located in Guantanamo Bay, Cuba. He faces charges of conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy. These charges carry a potential maximum sentence of life imprisonment. He will be prosecuted before a Military Commission established by Order of the Secretary of Defence of the United States of America.

[2] Khadr was apprehended in Afghanistan in July 2002 by the American military. Months later he was sent to Guantanamo Bay. Charges were laid against him in November 2005. No date has been set for his trial.

[3] On November 21, 2005, counsel for the Applicant wrote to the Respondents (the Letter). A copy of the Letter is attached as Annex A hereto. The key paragraph of that letter asked for:

> In light of the above, we hereby demand that you now provide us with copies of all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr in accordance with the requirements of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 as applied to extraterritorial prosecutions in such cases as *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A). Without limitation, these materials include all the content redacted from the documents referred to above. Relevance in this regard should be determined by reference to the matters pleaded in the enclosed charge sheet.

[4] On the same day, the Applicant filed a request under the *Access to Information Act*, R.S., 1985, c. A-1 with each of the Respondents and asked for the identical information as requested in the Letter.

[5] No response has been forthcoming and the Applicant has now brought an application for judicial review of:

> The decision of the Respondents to fail to respond to the demand made to the Respondents by letter dated November 21st, 2005 for full and complete disclosure of all materials in the possession of the Crown in Right of Canada which might be relevant to US charges recently raised against the Applicant by the government of the United States of America (the Charges)…

[6] The Applicant requests:

> An order in the nature of *mandamus* directing the Respondents to provide counsel for the Applicant with full and complete disclosure of all documents, records and other materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the Charges and which are therefore necessary for the purpose of allowing the Applicant to raise full answer and defence to the Charges…

The Applicant's position is quite straight forward. He argues that under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. (the Charter) he has a constitutional right to be provided with disclosure of all material relevant to the Charges that are in the possession of the Respondents.

[7] Section 7 of the Charter states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[8] The Applicant relies on *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1. He further argues that by virtue of *Purdy v. Canada (Attorney General)* (2003) , 226 D.L.R. (4th) 761(BCSC) aff'd (2003), 230 D.L.R. (4th) 361(B.C.C.A.), section 7 now applies to prosecutions in foreign jurisdictions where Canadian authorities are in possession of materials that can be used by the Applicant to defend himself against the foreign Charges.

[9] The Applicant suggests that the issue before me is the following:

> Can officials of the Canadian Government, acting in pursuance of legal authority, engage in conduct within Canada which itself frustrates the fairness of foreign prosecution of a Canadian citizen?

[10] It strikes me that the matter is much more straight forward, namely do the Applicant's rights under s. 7 of the Charter (as explained by *Stinchcombe*, above and expanded by *Purdy*, above) apply in the circumstances in which the Applicant finds himself?

[11] To answer that question, one must examine first what *Purdy*, above stands for, and second whether the situation of *Purdy*, above is analogous to that of the Applicant.

[12] It is well-established that the rights of Canadians when interrogated abroad by Canadian law enforcement agents are protected in certain circumstances. As Justice Iacobucci stated in *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 at paragraph 25:

> In our view, the Charter applies to the actions of the Vancouver detectives in interviewing the appellant in New Orleans. Two factors are critical to this conclusion and provide helpful guidelines for recognizing those rare circumstances where the Charter may apply outside of Canada: (1) the impugned act falls within s. 32(1) of the Charter; and (2) the application of the Charter to the actions of the Canadian detectives in the Untied States does not, in this particular case, interfere with the sovereign authority of the foreign state and thereby generate an objectionable extraterritorial effect.

[13] There must also be a reasonable foreseeable connection between Canada's actions and the violation of the Charter. This was established in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 at paragraph 54:

> While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in Burns should not apply with equal force here. In Burns, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than refoulement. Rather, the governing principle was a general one -- namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the

> deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

[14] The facts in *Purdy*, above were as follows. The Applicant was a Canadian citizen who was arrested and charged in the United States. The investigation was a joint effort by Canadian and American law enforcement agencies and was conducted primarily in Canada. The Applicant was arrested in the United States as a result of a ruse which avoided an extradition hearing.

[15] On the basis of these facts, the trial judge, Justice Satanove, found at paragraphs 19 to 25:

> In the case at bar, the Attorney General of Canada submits there is no justiciable Charter issue because in the absence of criminal charges in Canada, Mr. Purdy has no right to disclosure and the Crown has no obligation to disclose.
>
> This is a formidable argument worthy of consideration, but in my view, <u>the unique circumstances</u> of this case allow me to apply the general principle of *Stinchcombe*, that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right to make full answer and defence.
>
> The right to make full answer and defence is a common law right that has been incorporated in s. 7 of the Charter as one of the principles of fundamental justice:
>
> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and the incarceration of an innocent person. [*Stinchcombe*, supra, at p. 336.]
>
> The petitioner is a Canadian national whose life and liberty has been put in jeopardy <u>because of an investigation which took place in Canada and in which Canadian authorities played a major part</u>. In a joint investigation, such as this one, the ultimate forum in which the

> accused is tried should not deprive the accused from the observance by Canadian authorities of Charter rights to which the accused would otherwise have been entitled. Furthermore, if the ordinary extradition process had not been circumvented by the inducement of Mr. Purdy to travel to the U.S.A. under the pretence of doing a "clean deal", I believe he would have been entitled to disclosure, at least from the Canadian authorities, of information they had in their possession pertaining to their part in the investigation.
>
> The Attorney General of Canada spent a large part of its submissions on attempting to persuade me that the Charter is not a general empowerment of the court to order disclosure of government information, because to do so offends the other legislative schemes in place such as the *Access to Information Act*, the *Privacy Act* and s. 46 of the *Canada Evidence Act*.
>
> I agree with this submission, but I am not relying on any general empowerment of the Charter to order disclosure. I am ordering disclosure as a remedy for the infringement of Mr. Purdy's constitutional rights. I have found that Mr. Purdy is entitled to the protection of his right to make full answer and defence, because he is a Canadian whose freedom has been placed in jeopardy by the actions of Canadian legal authorities conducting a joint investigation with U.S. agencies, in Canada.(Underlining added)

[16] On appeal, Justice Donald affirmed the trial judge’s decision and stated the proposition even more succinctly at paragraph 20:

> In the present case, the deprivation of the right to full answer and defence is here in Canada by the R.C.M.P.'s refusal to make disclosure, although the effect of the deprivation will be felt in Florida. The respondent faces charges in the U.S. because of an investigation in Canada and because of the ruse employed by the police to by-pass extradition. The causal connection is, in my opinion, direct and obvious. And, as stated in *Cook*, supra, the respondent's Canadian nationality is a key consideration. (Underlining added)

[17] From the foregoing, it is quite obvious that the facts in *Purdy*, above were quite particular. The investigation had been done primarily in Canada, the investigation was a joint Canada-US

investigation, and a ruse had been used to lure the defendant to the US in order to avoid extradition proceedings. Under those circumstances, the court felt that there was a sufficient causal connection for the right to disclosure under s. 7 of the Charter and the principles set out in *Stinchcombe*, above to apply.

[18] *Purdy*, above stands for the exceptional case where disclosure can be justified if peculiar factual circumstances arise. *Purdy*, above does not stand for the proposition that whenever there is a foreign prosecution against a Canadian citizen and the Canadian government has some documents, that the accused is entitled to disclosure. This proposition would not be desirable or useful as it might lead to interference with foreign legal proceedings which Justice Iacobucci warned against in *Cook*, above. It could also act as an impediment to the providing of consular services by Canada, which is ironically the very thing the Applicant is seeking from the Respondents.

[19] The facts in the present case on the other hand are quite different:

i) there are no charges outstanding or investigations pending against the Applicant in Canada;
ii) the Applicant was arrested by US authorities in Afghanistan and transported to Guantanamo Bay, Cuba where he is held in custody;
iii) there was no investigation in Canada; and
iv) Canadian officials from CSIS and DFAIT, with the consent of US authorities, questioned him in detention at Guantanamo bay. The circumstances regarding that visit were examined in related proceedings, *Khadr v. Canada (2005), 257 D.L.R. (4th) 577, 2005 FC 107*6, where the Applicant sought a further injunction from interviews by CSIS and DFAIT. These proceedings were referred to in oral submissions by both sides. In those proceedings, this court, and this judge (who also acts as case-managing judge for the various proceedings of the Applicant against the Canadian government), found on the basis of affidavit evidence at paragraph 23:

[…]

> c) The DFAIT/CSIS visits were not welfare visits or covert consular visits but were purely information gathering visits with a focus on intelligence/law enforcement (DFAIT note of November 1, 2002, Applicant's Record, Ahmad affidavit,

> Tab 2Q, p. 148, para 7 and cross-examination of Serge Paquette, Respondent's Record, Tab 4, pp. 35 and 70);
>
> d) Summaries of information collected in the interviews were passed on to the RCMP (cross-examination of William Hooper, Respondent's Record, Tab 5, p. 7);
>
> e) Canadian agents took a primary role in the interviews, were acting independently and were not under instructions of US authorities (cross-examination of William Hooper, Respondent's Record, Tab 5, p. 22);
>
> f) Summaries of the information were passed on to US authorities (cross-examination of William Hooper, Respondent's Record, Tab 5, pp. 14, 15);

[20] The foregoing amply demonstrates that the causal connection mentioned both in *Suresh*, above and *Purdy*, above does not exist in this case. Nor do we have the unique circumstances of *Purdy,* above. That being the case, there is no analogy to *Purdy*, above and no basis for applying section 7 of the Charter.

[21] The Federal Court of Appeal set out the requirements that must be met for an order of *mandamus* to be granted in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 at paragraph 45:

> 1. There must be a public legal duty to act…
> 2. The duty must be owed to the applicant…
> 3. There is a clear right to performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty;…
> >
> > (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a

> subsequent refusal which can be either expressed or implied, e.g. unreasonable delay...
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
>
> (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
>
> (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
>
> (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
>
> (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e., the applicant has a vested right to the performance of the duty.
>
> 5. No other adequate remedy is available to the applicant ...
>
> 6. The order sought will be of some practical value or effect...
>
> 7. The Court in the exercise of its discretion finds no equitable bar to the relief sought...
>
> 8. On a "balance of convenience" an order in the nature of *mandamus* should (or should not) issue.

[22] Given the above finding, it is evident that the Applicant has failed to meet the first two requirements of the test for *mandamus*. Thus, there is no need to consider the other requirements and accordingly the Applicant’s request for an order of *mandamus* is denied.

ORDER

THIS COURT ORDERS THAT this application for judicial review be dismissed.

"Konrad W. von Finckenstein"
Judge

ANNEX A

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November 21, 2005

COPY

NATHAN J. WHITLING
DIRECT DIAL: (780) 423-8658
EMAIL: nwhitling@parlee.com
OUR FILE #: 62095-1/NJW

VIA REGISTERED MAIL

The Honourable Irwin Cotler
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

The Honourable Pierre Pettigrew
Minister of Foreign Affairs
Department of Foreign Affairs and International Trade
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125 Sussex Drive
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Director Jim Judd
Canadian Security Intelligence Service
PO Box 9732 Stn T
Ottawa ON K1G 4G4

Commissioner Giuliano Zaccardelli
RCMP Headquarters
1200 Vanier Parkway
Ottawa, ON K1A 0R2

Dear Sirs:

Re: Omar Ahmed Khadr - Detainee, Guantánamo Bay, Cuba

The writer, Mr. Dennis Edney and Professors Muneer Ahmad and Richard Wilson of American University act as counsel for Mr. Omar Ahmed Khadr. Mr. Khadr is currently detained by U.S. forces in Guantanamo Bay, Cuba. Mr. Khadr has recently been charged by the United States with the offences of Conspiracy, Murder by an Unprivileged Belligerent, Attempted Murder by an Unprivileged Belligerent, and Aiding the Enemy as detailed in the enclosed Charge Sheet. Kindly receive this letter as our formal joint demand pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* for production of all relevant documents in the possession of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr, and as such, are necessary to enable Mr. Khadr to raise full answer and defence to the charges.

Through our experience as Mr. Khadr's counsel, we have obtained copies of voluminous materials from DFAIT, CSIS and the RCMP under both the *Access to Information Act* and the Crown's production requirements in Federal Court of Canada Action Numbers T-536-04 and T-686-04. Much of the content of these documents has been redacted or withheld from us on the basis of assertions of privilege, including the statutory privilege created by s. 38 of the *Canada Evidence Act*. For further information regarding these materials, their content and the claims of

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privilege raised therein, we direct you to Ms. Doreen Mueller, Department of Justice Canada, Counsel for Her Majesty the Queen in Action Numbers T-536-04 and T-686-04, (780) 495-8352.

Based upon our review of these materials, it is apparent that DFAIT, CSIS, the RCMP and possibly other departments of the Crown in Right of Canada are in possession of materials which are relevant to the serious charges now raised against our client, and which materials are therefore necessary for Mr. Khadr to raise full answer and defence to said charges.

At the time that the claims of privilege referred to above were made, Mr. Khadr was not facing the charges. Consequently, Mr. Khadr's constitutional right to raise full answer and defence to the charges would not have been a factor taken into account. We take it you agree that Mr. Khadr's right to raise full answer and defence to the charges now overrides and outweighs the interests forming the basis of these previous assertions of privilege.

In light of the above, we hereby demand that you now provide us with copies of all materials in the possession of all departments of the Crown in Right of Canada which might be relevant to the charges raised against Mr. Khadr in accordance with the requirements of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 as applied to extraterritorial prosecutions in such cases as *Purdy v. Canada (Attorney General)* (2003), 230 D.L.R. (4th) 361 (B.C.C.A.). Without limitation, these materials include all the content redacted from the documents referred to above. Relevance in this regard should be determined by reference to the matters pleaded in the enclosed charge sheet.

We confirm that we are willing to accept the materials requested above upon the provision of formal undertakings by the writer, Mr. Edney, Professor Ahmad and Professor Wilson that said materials may only be reviewed by ourselves and Mr. Khadr's soon-to-be-appointed military defence counsel absent consent from the Crown or direction from the Court.

We request that within 30 days from receipt of this letter, you communicate your agreement to provide us with the materials referred to above within a reasonable timeframe, failing which, we will take you to have refused this request and immediately commence legal proceedings against you pursuant to s. 18.1(3)(a) of the *Federal Courts Act*.

Yours truly,

PARLEE McLAWS LLP

NATHAN J. WHITLING

NJW/ab
Encl.

cc: Dennis Edney (*via facsimile – with enclosure*)
Muneer Ahmad and Richard Wilson (*via facsimile – with enclosure*)
Doreen Mueller (*via facsimile – with enclosure*)

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-3-06
STYLE OF CAUSE:	Khadr v. Minister of Justice et al.
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	April 10, 2006
REASONS FOR ORDER AND ORDER:	**VON FINCKENSTEIN, J.**
DATED:	April 25, 2006

APPEARANCES:

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Ms. Doreen Mueller	FOR THE RESPONDENT(S)

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